Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.:

In the Supreme Court of the United States

ERNEST CARL CRANK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

(1) Whether a Court of Appeals can deny certification of appealability without giving any consideration to whether a Federal Habeas Corpus Petitioner has demonstrated an *Apprendi* violation respecting drug quantities that was raised *pro se* on direct appeal and misconstrued by the Habeas Court contrary to the explanation of *Apprendi* provided in the *Blakely* decision?

LIST OF ALL PARTIES

The caption contains the names of all parties to the proceeding in the court whose judgment is sought to be reviewed. There is no party with an interest to disclose pursuant to Rule 29(6).

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioner Ernest Carl Crank, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals entered on January 31, 2005.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Eighth Circuit denying Petitioner's *Application for Certificate of Appealability* entered on January 31, 2005, is unpublished and can be found in the Appendix attached to this Petition for Certiorari.

JURISDICTION

The January 31st Order, denying Petitioner his Certificate of Appealability [COA] from the an adverse habeas decision, came after a series of filings and rulings which explicated Petitioner's contention that the decision by the District Court contradicted the holding of the United States Supreme Court in *Apprendi* v. *New Jersey*, 530 U.S. 466, 490, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000). The District Court's denial of habeas

relief was entered May 12, 2004, a little over a month before this Court's decision in *Blakely v. Washington,* 542 U.S. 124 S. Ct. 2531, 159 L. Ed. 2d 403 (June 24, 2004). Because the case at bar was appealed ten days earlier on June 14, 2004, *Blakely* applies.

By relying on a supposed procedural default or lack of jurisdiction to hear the appealability of the issues, the Court of Appeals would cut off jurisdiction of this court to review rulings which are in conflict with its own clearly established precedents. A court always has jurisdiction to consider its own jurisdiction. See Hohn v. United States, 522 U.S. 236, 252, 139 L. Ed. 2d 1969, 1978, 118 S. Ct.242, 260 (1997); Slack v. McDaniel, 529 U.S. 473, 146 L. Ed. 2d 542, 120 S. Ct. 1595 (2000) ; Miller-El v. Cockrell, 537 U.S. 322, 154 L. Ed. 2d 931, 123 S. Ct. 1029 (2003)

Jurisdiction of this Court is invoked under Title 28, United States Code Section 1254(1).

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment V

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STATEMENT OF THE CASE

Earnest Carl Crank brought a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. §2255. Crank was found guilty by a jury of six counts of conspiracy to distribute and distribution of cocaine and cocaine base. His initial sentence of 245 months was partially vacated and remanded by the Court of Appeals for the Eighth Circuit based on *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The district court re-sentenced Crank to 240 months on each count to be served concurrently. This sentence was affirmed by the Court of Appeals. **Docket No. 105, p. 1.**

The District Court rejected the Petitioner's *Apprendi* argument by refusing to grant an *habeas* evidentiary hearing on whether the Petitioner was entitled to a jury trial or re-sentencing. The Petitioner maintained that his re-sentencing was in violation of *Apprendi* because his sentence was enhanced from 10 to 20 years based on drug quantities determined by a Sentencing Court by a lesser evidentiary standard. The Petitioner had raised these matters in a Supplemental *Pro Se* Brief filed with the 8th Circuit Court of Appeals on August 17, 2001.

This Petition for Writ of Certiorari is brought because the Petitioner was denied a COA by both the Habeas Court and the Court of Appeals. The Habeas Court granted a COA for 4 of the 6 issues which the Petitioner sought to raise on appeal. **Docket No. 110, Appendix A.** A Panel of the Court of Appeals reversed the grant of a COA and dismissed the appeal without determining the appealability of the *Apprendi* issue. **Docket No. 112,Appendix B.**

A good many of the procedural facts of this case are summarized in an Order entered at the direction of the Court of Appeals by the Clerk, the Honorable Michael E. Gans on January 31, 2004:

> The following events transpired during calendar year 2004. On August 11, this court vacated a certificate of appealability issued by the district court on four of six issues raised by Crank and dismissed his appeal. Instead of filing a timely petition for rehearing and rehearing en bane, Crank moved for an extension until November 24 to file his petition, and the motion was granted on September 27. Again, instead of filing a timely petition, Crank moved for another sixty-day extension. This motion was denied

on December 10, and having dismissed the appeal on August 11, the mandate issued on December 17. On the same day, Crank filed an application for a certificate of appealability on the two issues the district court rejected when it issued the certificate of appealability mentioned above.[1] In considering Crank's application, we necessarily construe it to include a request to recall the mandate, and having carefully considered the sequence of events summarized above, we deny Crank's request to recall the mandate and his application for a certificate of appealability.

It is so ordered.

The Appellant [Petitioner in a Habeas Corpus proceeding below] had requested extensions of time because "the *Petition for Rehearing and Rehearing En Banc* [would] concern an issue

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[1] While it is accurate to say that the Mandate issued on the same day, the 2nd Application for a Certificate of Appealability was actually filed with the Court of Appeals at 10:59 a.m. Appendix F. The Mandate of the Court was transmitted to the District Court at 12:52 p.m. Appendix D. Thus, in a technical sense the Application was filed before the Mandate was issued.

affected by the recent Supreme Court case of *Blakely v. Washington*, 124 S. Ct. 2531 (June 24, 2004)." In his second extension of time counsel for petitioner indicated his belief that "the case at bar [fell] in that category of cases wherein briefs should be withheld until the U. S. Supreme Court decisions in *U.S. v. Booker* and *U.S. v. Fanfan* [were] finally reached." Motion for Extension of Time, 11/24/'04. The Court of Appeals disagreed. Order 12/10/2004.

Shortly after the extension of time was denied, Petitioner filed a second *Application for Certificate of Appealability* (this time directly with the Court of Appeals). Petitioner reminded the Court of Appeals that the District Court had granted the Petitioner's original Application for Certificate of Appealability as to the first 4 of 6 issues requested for certification. The Application also recounted the procedural fact that on August 11, 2004, a panel of this Court issued a decision reversing the District Court's determination that a Certificate of Appealability should be granted with respect to the first four issues, dismissing the appeal and ruling the Motion for Limited Remand was moot. *Application for Certificate of Appealability,* 12/17/2004, p.2.

Petitioner went on in his second *Application for Certificate of Appealability* to delineate the crux of the reason why the Court of Appeals should consider the granting of a COA:

> 11. No circuit court judge has ruled on the Applicant's original certificate of appealability with respect to the 5th and 6th issues:
>
> a. Ineffectiveness of appellate counsel and re-sentencing counsel in failing to raise the *Apprendi* issue on re-sentencing due to a lack of communication with defendant.
>
> b. Cumulative errors creating ineffective assistance of counsel, which should be examined because a majority of Circuits allow for cumulative error.

Application for Certificate of Appealability, 12/17/'04, p.3

A timely Notice of Appeal was filed in this case on June 14, 2004. **Docket No. 107.** The District Court granted a COA with respect to the first four issues but refused to certify on the 5th and 6th issues. Petitioner filed a Motion for Remand on August 3, 2004, requesting that the Court of Appeals remand in order for the lower Court to reconsider its refusal with respect to those issues.

In his Motion for Remand the Petitioner defined the matter as a post-*Apprendi*/pre-*Blakely* case wherein it appeared the Circuit Court during direct review had misapprehended *Apprendi* matters. Petitioner argued that the case was not barred from reconsideration by the District Court. *Motion for Remand*, p.4

Also, in the Motion for Remand Petitioner quoted from Justice Scalia in *Blakely v. Washington*, for the purpose of outlining to the Circuit Court the meaning of statutory maximum punishment, which had been heretofore ambiguously interpreted. "Our precedents make clear, however, that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Motion for Remand*, p.3

Finally, in the Motion for Remand, Petitioner asserted that the Defendant had been correct in his attempts to assert *Apprendi* at Re-sentencing and on Direct Review as well as his continuing presentation of ineffectiveness at every stage directly relating to the type and amount of drugs which under the law as established by the 8th Circuit in this case is an *Apprendi* matter: "Because the indictment did not charge any specific drug quantity and the Jury

did not make any finding as to drug quantity, we vacated all but the cocaine distribution sentence and remanded for resentencing in light of *Apprendi*." *USA v Crank*, 01-1775, page 1 (8th Cir. 10/25/01)

After a COA had been granted by the Habeas Court, a panel of the 8th Circuit Court of Appeals was presented with both the *Motion for Limited Remand* filed by the Petitioner and a *Motion to Vacate the Certificate of Appealability* filed by the Government. On August 11, 2004 the Panel [Loken, Fagg & Beam] ruled that the COA was vacated as improvidently granted. The *Motion for Remand* was denied as moot. And, the appeal was dismissed. Order, 8/11/05.

On August 11, 2004 when the Panel vacated the lower Habeas Court's Certificate of Appealability [COA] it failed to address the appealability of the *Apprendi* issue. Despite the petitioner's *Motion for Remand* and *Appendix Preparation Notice and Designation of Issues, which* articulated the two issues not certified by the District Court, the Panel dismissed the appeal without any ruling upon the appealability of these two issues. This lack of ruling took place despite the fact that the original

Application for Certificate of Appealability, the *Motion for Remand,* and the *Designation of Issues* all explicated the fact that the decisions contradicted holdings of the United States Supreme Court in *Apprendi* v. *New Jersey,* 530 U.S. 466, 490, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000).

By the time the Clerk entered the Court's order on January 31, 2005, a *Notice of Appeal* had been timely filed; an *Application for Certificate of Appealability*[2] and an *Addendum* to the *COA Application*[3] had been filed with the District Court; A *Motion for Limited Remand* in light of *Blakely* and *Mooney* and as well as an *Appendix Preparation Notice and Designation of Issues* had been

---

[2] The *Application* requesting certification for, *inter alia,* review of an *Apprendi* issue was filed 1day before *Blakely* was filed. **Docket No 109**

[3] In the *Addendum,* which was mailed on 7/14/2004, Petitioner raised *Blakely.* Unfortunately, this document arrived after the Habeas Court entered its Order 7/11/2004, *inter alia,* denying the appealability of the *Apprendi* issue. The Order was signed 15 days after the *Blakely* decision. **Docket Nos. 110 & 111.** Certified Copies of the COA Order were not received by the Circuit Court until 7/19/'04.

filed with the Circuit Court[4]; and a second *Application for Certificate of Appealability* was filed with the Circuit Court[5]; all before the mandate had issued. Nevertheless, no ruling has ever been entered by the Circuit Court regarding the appealability of these two issues, which are in conflict with prior rulings of the United States Supreme Court. FRAP 22(b)(2) states that even if no express request for a certificate has been filed, "the notice of appeal constitutes a request addressed to the judges of the court of appeals."

In addition, Petitioner had filed an *Appendix Preparation Notice and Designation of Issues* simultaneously with his *Motion for Remand* Filed at the 8th Circuit Court of Appeals 8/5/2004. As such, the contents of that required filing were also before the

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[4] In the *Motion for Remand* Petitioner detailed that Issue 5 involved a decision in conflict with rulings of this Court (Apprendi/Blakely) and Issue 6 involved a decision where the 8th Circuit was in conflict with a majority of Circuit Courts.

[5] In the second Application for Certificate of Appealability, Petitioner again set out the possibility that both remaining issues were in conflict with the United States Supreme Court rulings.

Court although no reference is made to it in the August 11 Order. In the *Appendix Preparation Notice and Designation of Issues* Appellant indicated his intention in his Appellant's Brief "to argue the latter two issues and contest the District Court's denial of their appealability for the following reasons:

> a. The post-*Apprendi*/pre-*Blakely* issue referred to in paragraph 5.a. above should be considered in light of *Blakely v. Washington* (June 24, 2004); *United States v. Mooney*, No. 02-3388 (8th Cir. 07/21/2004) and any future related decisions in these regards." *Appendix Preparation Notice and Designation of Issues* filed with the 8th Circuit on 8/3/2004, page 2.

The Panel makes no reference in its Order dismissing the Appeal August 11, 2004, to this previous filing which was sent to the Court on August 3rd and received by the Court on August 5th along with the *Motion for Remand.* However, Petitioner-Appellant maintains the *Designation of Issues* put the Court of Appeals on notice that the Petitioner was requesting the Circuit Court Judges to consider granting a COA concerning the *post-Apprendi/pre-*

Blakely issue. Moreover, Petitioner was indicating the present effect which *Blakely* had on the interpretation of *Apprendi.*

REASONS FOR GRANTING THE WRIT

1. The rulings of the 8th Circuit on Direct Appeal and the District Court in denying the Motion for Habeas Relief without hearing are in legal conflict with the ruling of the Supreme Court in *Apprendi {as explicated in Blakely}* and should be reviewed by the Court of Appeals in light of existing precedent.

Unlike *Schirro* v. *Summerlin*, 124 S. Ct. 2519 (06/24/'04) and *Teague v. Lane*, 489 U.S. 288, 313 (1989); the case at bar was on Direct Review at the time of the *Apprendi* decision. In fact Crank's initial sentence was partially vacated and remanded back to District Court by this Court based on *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Order, Wolle, May 12, 2004; p. 1. **Docket No. 105.**

a. Failure by the Habeas Court to grant an evidentiary hearing was based on a legal error in conflict with the Supreme Court decision in *Apprendi {as explicated in Blakely}*.

The lower Court, in its May 12, 2004 Order, describes its reasoning for denying 2255 relief without hearing based on its erroneous understanding of *Apprendi*:

> Defendant wanted a new determination of drug quantity either through trial or re-sentencing. Essentially, he believed that if Apprendi applied to his case, that is, a jury determination of the drug amount made beyond a reasonable doubt, he would at least receive a different sentence and even possibly be acquitted. Crank asserts he was unable to make his request known to his appellate counsel or resentencing counsel because counsel changed addresses and did not keep defendant informed of this change. Counsel for Crank asserts that where there is ambiguity as to what drugs were actually distributed, the defendant is entitled to a special verdict. Counsel also discounts the government's reliance on Edwards v. United States, 523 U.S. 511 (1998) (district court should determine type and amount of drugs

involved when determining the applicable sentencing range under the guidelines so long as sentence imposed does not exceed that applicable to the offense found by the jury) as it was decided pre-Apprendi.

This argument also fails. The Court of Appeals has relied on Edwards even in post-Apprendi cases. See e.g. United States v. Miller, 295 F.3d 824, 827 (8th Cir. 2002); United States v. Gallardo-Marquez, 253 F.3d 1121, 1124 (8th Cir. 2001). Further as discussed previously, there is no ambiguity as to the drugs that were involved in this case. Through the laboratory reports and witness testimony, it was clear that Crank distributed both crack and powder cocaine. The Court of Appeals found there was sufficient evidence of this in the first appeal, and based on this finding and the new sentence imposed, also held that the new sentence was valid under Apprendi, See United States v. Crank, No. 01-

1775 (8th Cir. October 25, 2001). Thus, even if counsel, at re-sentencing, had requested that the jury make findings on this issue, the motion would have been denied. As there is no prejudice to defendant, there is no valid claim here for ineffective assistance of counsel. **Docket No. 105, page 9.**

What the lower Court fails to note is that Crank filed a *pro se* brief to this Court claiming he was denied his constitutional rights as articulated by *Apprendi* at both trial and sentencing. Supplemental *Pro Se* Brief filed with the 8th Circuit Court of Appeals on August 17, 2001. This denial of rights was not only the right to a jury determination, but to a determination beyond a reasonable doubt. Thus, the errors sounded on a denial of Petitioner's rights under both the Fifth and Sixth Amendments. When the Appeal from the re-sentencing was taken, the 8th Circuit Court of Appeals, like most other Circuit Courts at the time, felt that the maximum penalty meant the 20-year statutory maximum:

Crank argues his new sentence is invalid under *Apprendi.* This Argument fails because his new sentence does not

exceed the statutory maximum term of imprisonment he faced on his offences without regard to drug quantity.

USA v Crank, 01-1775, page 2 (8th Cir. 10/25/'01)

Thus, as a post-*Apprendi*/pre-*Blakely* case wherein it appears the 8th Circuit Court of Appeals misapprehended *Apprendi*, this case should have been considered on habeas appeal in light of *Blakely* because that case was decided while the case at bar was on appeal from the incorrect and adverse habeas decision. In *Blakely v. Washington*, Justice Scalia fully articulates the meaning of statutory maximum punishment, which had been ambiguously interpreted. "Our precedents make clear, however, that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Blakely*, 124 S. Ct. 2531, 2537, 159 L. Ed. 2d 403, 413 (2004).

It is apparent that the Defendant was correct in his attempts to assert *Apprendi* at Resentencing and on Direct Review. He was likewise correct to pursue counsel's ineffectiveness at every stage directly relating to the type and amount of drugs which is an *Apprendi* matter. After all, the Court of Appeals on Direct

Appeal had vacated all but the cocaine-distribution sentence and remanded for resentencing in light of *Apprendi* because the indictment did not charge any specific drug quantity and the Jury did not make any finding as to drug quantity. *USA v Crank*, 01-1775, page 1 (8th Cir. 10/25/'01)

Under *Blakely* it presently appears that the Re-Sentencing Court, the Circuit Court on Direct Review of the Re-Sentencing, the Habeas Court and the Circuit Court failing to grant a COA were all incorrect. See *United States v. Crank* No. 01-1775 (8thCir. 10/25/2001) for an example. The Petitioner, despite the multiple errors of counsel and the courts, was persistently correct about the applicability of *Apprendi.* The validity of his assertions was confirmed by the decision in *Blakely* and is not modified by *Booker/Fanfan*. This Court should grant Certiorari and instruct the 8th Circuit to grant a Certificate of Appealability and to take such actions as will allow for a proper hearing on all the issues associated with *Apprendi* in light of *Blakely* along with the more recent decision of *United States v. Booker & Fanfan*, 125 S. Ct. 738; 160 L. Ed. 2d 621 (January 12, 2005).

b. Denial of a COA by the District Court and failure by the Judges of the Court of Appeals to review that decision consistent with FRAP 22 as modified by the ADEPA denied Petitioner his rights under the 5th & 6th Amendments.

In its May 12, 2004 Order denying habeas relief the lower Court indicates that the Court of Appeals held that the new sentence (which had been reduced from 245 months to 240 months based on an *Apprendi* remand) complied with *Apprendi.* This decision conformed with the widespread mistake that a Judge could enhance a sentence beyond the maximum penalty that could be imposed based on a jury finding without using the reasonable doubt standard so long as the penalty was within the statutory maximum. As a practical matter this interpretation allowed Crank's sentence to be raised from 10 to 20 years in violation of his Fifth and Sixth Amendment rights.

The Petitioner cited *Blakely* on July 15, 2004 to the District Court by Supplement to his Application for Certificate of Appealability to demonstrate the prior errors in construing *Apprendi* [**Docket No. 111**]; in A *Motion for Limited Remand* and again in an *Appendix Preparation Notice and Designation of*

Issues both filed with the 8th Circuit on August 3, 2005. Thus, the second Application for Certificate of Appealability was unnecessary to secure a decision from the Judges of the 8th Circuit Court of Appeals concerning the appealability of the *Apprendi* issue.

In the case at bar, the Court of Appeals has not demonstrated compliance with § 2253(c) with respect to the *Apprendi/Blakely* issue. Recent decisions of the United States Supreme Court make clear the thoughtful type of analysis in which a Circuit Court is required to engage:

> The COA determination under § 2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits. We look to the District Court's application of AEDPA to petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason.
>
> * * * *
>
> Accordingly, a court of appeals should not decline the application for a COA merely because it

believes the applicant will not demonstrate an entitlement to relief. The holding in *Slack* would mean very little if appellate review were denied because the prisoner did not convince a judge, or, for that matter, three judges, that he or she would prevail. *Miller-El v. Cockerell,* 537 U.S. 322, 336-337, 123 S. Ct. 1029, 1039, 154 L. Ed. 931, 949-950 (2003).

Moreover, there is an overriding concern that (despite the requirement of FRAP 22 as modified by the AEDPA, that judges of the circuit court ultimately ensure a proper ruling on appealability of issues the 8th Circuit Court has failed to rule by saying that Petitioner's latest request for certification is actually a request to recall the mandate. This procedure misconstrues the obligation imposed by the filing of the Notice of Appeal and the required *Appendix Preparation Notice and Designation of Issues.*

Consistent with our prior precedent and the text of the habeas corpus statute, we reiterate that a prisoner seeking a COA need only demonstrate "a substantial showing of the denial of a constitutional right." 28 U.S.C.

§ 2253(c)(2). A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further. *Slack, supra*, 529 U.S. at 484. *Miller-El, supra.* At 327, 1034, 944.

The second *Application for Certificate of a Appealability* was not required for the Circuit Court to rule on the *Apprendi* issue. Rather, it was a timely reminder to the Appellate Court of its obligation under FRAP 22. To summarily deny the Petitioner an opportunity to appeal an incorrect *Apprendi* ruling after *Blakely* had been decided on the basis of whether the mandate issued an hour before or an hour after the second *Application for Certificate of a Appealability* was filed is to misapprehend the overall state of the record.

The rationale fails for a number of reasons:

1. The mandate had not yet been transmitted when the second *Application for Certificate of Appealability* arrived at the Circuit Court.

2. This second *Application for Certificate of Appealability* was the 5th filing which put the Circuit Court on notice of its responsibility to determine whether the *Apprendi/Blakely* issue was appealable;

3. The probability that reasonable jurists would find the issue debatable as to whether the Habeas Court's denial of a hearing was in conflict with existing Supreme Court precedent was manifest on the face of the issue as presented to the District and Circuit Courts

See for example, the multiple decisions by the 8th Circuit itself in the cases of *United States v. Mooney*, 401 F.3d 940; 2005 U.S. App. LEXIS 4938 (March 28, 2005) and *United States v. Pirani*, 2004 U.S. App. LEXIS 17012 (8th Cir. Ark., Aug. 16, 2004);

4. No *Application* was required once the Circuit Court became aware of these issues; particularly, in light of the well-known environment for judicial change and disagreement of reasonable jurists as evidenced by the close split of the substantive and remedial majorities in *Booker/Fanfan*;

5. Denial of review based on a questionable procedural technicality in the midst of widespread juridical

uncertainty violated the Appellant's right to due process and ultimately to the reasonable doubt standard as guaranteed by the Fifth Amendment;

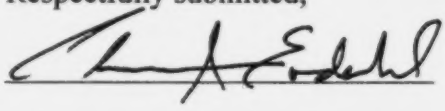
6. Denial of review based on a questionable procedural technicality in the midst of widespread juridical uncertainty violated the Appellant's right to effective representation of counsel and ultimately to the right of trial by jury as guaranteed by the 6th Amendment. In Accord. *Slack*, supra. at 484, 1603, 555.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that the petition for Writ of Certiorari should be granted.

Dated May 2, 2005

Respectfully submitted,



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ATTORNEY FOR PETITIONER

PROOF OF SERVICE

I hereby certify that on this 2nd day of May, 2005, I, the undersigned person, served three copies of the Petition in this cause by mailing the same to the following counsel for Respondent:

Solicitor General of the U.S. Department of Justice

10th Street & Constitution Avenue NW

Washington, DC 20530

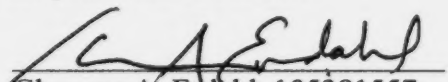
Cliff Cronk

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1830 2nd Ave.

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in full compliance with the provision of Rule 29.



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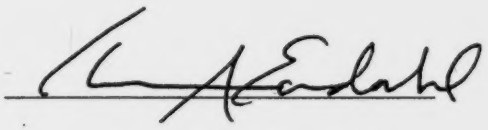
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CERTIFICATE OF FILING

I, Clemens A. Erdahl, attorney for the Petitioner, hereby certify that I filed forty copies of the Petition with the Clerk of the Supreme Court of the United States by mailing the same by regular mail to 1 First Street NE, Washington DC 20543 on the 2nd day of May, 2005.



Clemens A. Erdahl 105381557

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ATTORNEY FOR PETITIONER

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA, Plaintiff, v. ERNEST CARL CRANK, Defendant.	NO. 98-175 ORDER

Earnest Carl Crank brings this motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. §2255. Crank was found guilty by a jury of six counts of conspiracy to distribute and distribution of cocaine and cocaine base. His initial sentence was partially vacated and remanded by the Court of Appeals for the Eighth Circuit based on Apprendi v. New Jersey, 530 U.S. 466 (2000). The district court resentenced Crank to 240 months on each count to be served concurrently. This sentence was affirmed by the Court of Appeals affirmed the sentence.
United States v. Crank, No. 01-1775 (8th Cir. October 25, 2001)(unpublished)(per curiam).

Defendant now brings this motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. In his motion he states tat his conviction should be overturned for a number of reasons. The government resists the motion. Through counsel, Crank filed a reply to the government's original response but did not amend his complaint. Crank also filed a pro se reply to the government's response which counsel incorporates into his brief.

A prisoner is entitled to an evidentiary hearing on section 2255 motion unless the motion, files and records of the case conclusively show that the prisoner is not entitled to relief. 28 U.S.C. § 2255; Voytik v. United States, 778 F.2d 1306, 1308 (8th Cir.1985). "Accordingly, a petition can be dismissed without a hearing if (1) the petitioner's allegations, accepted as true, would not entitle the petitioner to relief, or (2) the allegations cannot be accepted as true because they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact." Engelen v. U.S., 68 F.3d 238, 240 (8th Cir.1995). The court denies the motion without a hearing for the reasons that follow.

Pro Se Section 2255 Motion

Crank's pro se motion makes five general claims of (1) ineffective assistance of pretrial, trial, sentencing and appeal counsel; (2) insufficient evidence of drug amounts; (3) improper jury instructions; (4) improper amendment of the indictment, and (5) lack of subject matter jurisdiction.

Crank asserts his counsel was ineffective because there was no preparation or discussion or trial strategy with Crank, no information of any plea discussions, he failed to raise what Crank thought were relevant issues, failed to file certain pretrial motions, failed to request forensic analysis, failed to object to drug evidence and lab reports, failed to discuss any possible stipulations concerning drug evidence; failed to follow through on motion for mistrial based on the cross examination of Charles Ledoux, failed to object to the amendment of the indictment, failed to discuss presentence report, failed to properly represent defendant during appeal by not consulting with defendants, not consulted on the resentencing appeal, second appeal was submitted late, failed to argue for a sentence on cocaine rather than cocaine base, and failed to require all rulings of court be made on the record.

Other than listing these issues, Crank does not give any other support for his claims. Assertions of ineffective assistance which are stated in a conclusory fashion are not sufficient to state a viable claim, and such claims may be dismissed without a hearing. Delgado v. United States. 162F.3d 981,983 (8th Cir. 1998)(where there is "no showing of what other witnesses were available, how they would have testified, and why such additional evidence would likely have affected the result, he has failed to prove either that counsel's assistance was ineffective or prejudice."); see also Saunders v. United States, 236F.3d 950, 952-953 (8th Cir. 2001) (petition failed to identify other witnesses and what testimony might be and thus, impossible to determine impact on trial or defense). Crank has failed to set forth specifically what counsel should have done differently or how any alleged errors changed the outcome of the proceeding. He failed to allege how counsel erred in arguing sentencing or how further meetings with this attorney would have affected the outcome of his trial. He does not identify what issues he wanted counsel to raise at trial or on appeal, and does not state how further tests or expert analysis could have been used to his benefit. Crank does not state what

plea offer was ever made to him or whether he would have accepted such an offer. In essence, the allegations and claims under ineffective assistance of counsel are far too vague and broad to state a claim.

The same is true for defendant's other claims. He fails to state why the testimony of Trisha Miller did not have a significant indicia of reliability to meet the required standard of proof, or why he believes it was error for the government erred not to submit a special verdict form to the jury. Crank states no basis for his claim that the indictment was improperly amended or that the court lacked jurisdiction over his claim. Without more information and description, these claims as stated are all too broad and sweeping to state a cognizable claim. See Saunders 236 F.3d at 953 (citing Cooper v. Schriro, 189 F. 3d 781, 785 (8th Cir. 1999)(petition "lacks Sufficient specificity under even the most liberal pleading requirements.")). Thus any claims raised by defendant, pro se, are dismissed unless they are further supported either by counsel or in a pro se supplemental brief. The court only discusses below those claims which are further briefed by either counsel or plaintiff, pro se.

Defendant's Reply to Government Response

Although counsel for defendant states that he does not waive any of the issues raised by defendant's pro se pleadings, he only addresses and briefs the issues of ineffective assistance of counsel with respect to false and misleading evidence, unreliable evidence, ineffective appellate and resentencing counsel, and ineffectiveness in the totality of the circumstances.

A. Ineffective Assistance of Counsel

To prevail on an ineffective assistance of counsel claim, defendant must show (1) counsel's representation was deficient, and (2) the deficiency prejudiced him. Strickland v. Washington, 466 U.S. 668 (1984). To establish the first prong, it must be shown that counsel's performance fell below an objective standard of reasonableness. Id at 694. The court need not address both components of the test if defendant makes an insufficient showing on one of the prongs. Id at 697.

1. False and Misleading Evidence Due to Ineffective Assistance of Counsel

Defendant asserts that trial counsel should have obtained an expert to object to the five laboratory reports introduced as

evidence at his trial. The laboratory reports showed that the relevant substances were cocaine base (crack), cocaine base, and salt of cocaine, with respect to each example. Defendant argues that trial counsel should have sought the appointment of an expert to examine and test the substances and to advise counsel on appropriate cross-examination questions of the laboratory experts.

Defendant asserts that these facts are similar to those in United States v. Monroe, 978 F.2d 433 (8th Cir.1992), where the only issue for the court to determine was whether the substance was crack cocaine or cocaine powder. In Monroe, the testimony of the government's laboratory expert was in and of itself inconsistent. Id. at 435. Because the government's own witness testified that the sample could be one of several substances, the Court of Appeals vacated Monroe's sentence and remanded the case to the district court for resentencing. Id.

Defendant argues that the laboratory reports in this case were inconsistent. However, here there were five substances examined, independently tested and weighted. Each of them came back with different weights and findings. In Monroe, there was on laboratory sample and the expert had described the sample as both

crack and as powder cocaine. Here, the laboratory results have a different result for each sample but there is no inconsistency within any single sample. Thus, this case is not like Monroe where there was inconsistent testimony by the same witness regarding one substance sample. There was no basis upon which to challenge the description of each substance, and therefore, it was not deficient for trial counsel to fail to obtain an expert witness.

Even if defendant could show that counse4l should have secured an expert, he has failed to show how such expert would have prejudiced him, that is, how it would have changed the outcome of the trial. There is no showing or assertion that an expert would have had different results than the laboratory results of the government witness. Without more, defendant's argument in his brief fails to show that hiring an expert would have necessarily undermined the credibility of the government's witness. No prejudice has been shown on this issue, and therefore, no valid ineffective assistance of counsel claim.

2. Failure to Properly Prepare for Cross Examination of Government's Witness

Prior to defendant's trial, a detention hearing was held. According to trial counsel's notes from that proceeding, Hope Overton testified that she only purchased powder cocaine from defendant. Defense counsel was also aware from the report of Agent Greg Brugman that Trish Miller intended to buy crack from defendant but returned with powder cocaine. Defendant further asserts that the grand jury testimony of Hope Overton reflects that she only purchased powder cocaine from defendant. Because all pretrial testimony referred to powder cocaine, Crank argues that the trial counsel should have impeached the trial witnesses when they inferred that they also purchased crack cocaine from defendant.

It is unclear why counsel did not try to impeach the witness on this point. It may have been a failure to study the record or a tactical reason. Regardless of the reason, however, Crank cannot show that such a deficiency was prejudicial to him to satisfy Strickland. During the direct examination of Overton, both she and the prosecutor referred to the substances as either

"transactions" or "drugs." Even if counsel should have cross-examined Overton and Miller as to the type of substance they purchased from Crank, defendant can not show prejudice as defined by Strickland. In addition to the testimony of Overton and Miller, the government called law enforcement officials to corroborate their testimony and there were laboratory reports and samples themselves to show that Crank sold both crack and powder cocaine. Thus, even if counsel had attacked the credibility of Overton and Miller on this basis, it would have been insufficient to show a reasonable probability that the proceeding would have been different. As such, there is no claim for ineffective assistance of counsel.

B. Ineffective Sentencing Counsel

1. Unreliable Evidence

Crank argues that because trial counsel was ineffective for failing to contest the laboratory reports or challenge the witness statements with respect to the type of substance, the sentencing court did not have adequate information upon which to base a determination of quality of drugs.

For the reasons given above, trial counsel was not ineffective for failing to do these things, and similarly, neither was sentencing counsel. There was sufficient reliable evidence in the record as to the amount and types of drugs. Even if defendant had challenged the evidence, there was enough other evidence to establish the quantity and type of drug involved. Again, without prejudice, there is no underlying claim for ineffective assistance of counsel.

2. Obstruction of Justice

Defendant was given a two level adjustment in penalty for obstruction of justice under U.S.S.G. §3C1.1. "[I]f a defendant objects to a sentence enhancement resulting from [his] trial testimony, a district court must review the evidence and make independent findings necessary to establish a willful impediment to, or obstruction of, justice, or an attempt to do the same, under the perjury definition we have setout." United States v. Dunnigan, 507 U.S. 87, 95 (1993).

Defense counsel did not object to the presentence report or object at the time of sentencing. Even if counsel should have made the objection, the result of the proceeding would not have

been different. The sentencing court believed the testimony of some witnesses to be exaggerated but accepted and found a sufficient basis for the jury's conclusion that the defendant had been involved in illegal drug transactions. See Sentencing Transcript at 18. Defendant denied involvement in the drug transactions. With such contrasting positions, if there had been an objection, the court would have made the requisite finding of perjury by defendant. Thus, defendant was not prejudiced when his counsel did not object to the obstruction of justice enhancement.

C. Ineffective Appellate Counsel and Re-Sentencing Counsel

Defendant wanted a new determination of drug quantity either through trial or resentencing. Essentially, he believed that if Apprendi applied to his case, that is, a jury determination of the drug amount made beyond a reasonable doubt, he would at least receive a different sentence and even possibly be acquitted. Crank asserts he was unable to make his request known to his appellate counsel or re-sentencing counsel because counsel changed addresses and did not keep defendant informed of this change. Counsel for Crank asserts that where there is ambiguity as to

which drugs were actually distributed, the defendant is entitled to a special verdict. Counsel also discounts the government's reliance on Edwards v. United States, 523 U.S. 511 (1998)(district court should determine type and amount of drugs involved when determining the applicable sentencing range under the guidelines so long as sentence imposed does not exceed that applicable to the offense found by the jury) as it was decided pre-Aprendi.

This argument also fails. The Court of Appeals has relied on Edwards even in post-Apprendi cases. See e.g. United States v. Miller, 295 F.3d 824, 827 (8th Cir. 2002); United States v. Gallardo-Marquez, 253 F.3d 1121, 1124 (8th Cir. 2001). Further, as discussed previously, there is no ambiguity as to the drugs that were involved in this case. Through the laboratory reports and witness testimony, it was clear that Crank distributed both crack and powder cocaine. The Court of Appeals found there as sufficient evidence of this in the first appear, and based on this finding and the new sentence imposed, also held that the new sentence was valid under Apprendi. See United States v. Crank, No. 01-1775 (8th Cir. October 25, 2001). Thus, even if counsel, at resentencing, had requested that the jury make findings on this

issue, the motion would have been denied. As there is no prejudice to defendant, there is no valid claim here for ineffective assistance of counsel.

D. Cumulative Errors Create Ineffective Assistance of Counsel

Defendant argues that cumulative errors justify a finding that his counsel was ineffective. "[N]umerosity of the alleged deficiencies does not demonstrate by itself the necessity for habeas relief." United States v. Robinson, 301 F.3d 923, 926 n.3 (8th Cir. 2002) (citing Wainwright v. Lockhart, 80 F.3d 1226, 1233 (8th Cir.)(rejecting argument that cumulative effect of errors alone demonstrates deprivation of fair trial), cert denied, 519 U.S. 968 (1996))).

Although defendant believes that the Eighth Circuit Court of Appeals is wrong to not recognize the rule of cumulative error as it relates to ineffective assistance of counsel, it is an issue Crank will have to raise on appeal rather than with this court. This claim is dismissed.

RULING AND ORDER

For the foregoing reasons, defendant's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 is denied and dismissed.

IT IS SO ORDERED.

Dated this 12th day of May, 2004.

/s/ Charles R. Wolle

CHARLES R. WOLLE, JUDGE

United States District Court

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA, Plaintiff, v. ERNEST CARL CRANK, Defendant.	NO. 98-175 ORDER

The Court has before it defendant's application for certificate of appealability filed after the Court denied his motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255. District Courts have the authority to issue certificates of appealability under 28 U.S.C. § 2255(c) and Fed. R. App. P. 22(b).

The court **grants** defendant's application for certificate of appealability on the first four issues set out in the application; ineffectiveness of trial counsel and sentencing counsel for several reasons there set forth. The court **denies** the application as to the fifth and sixth issues: an Apprendi argument and alleged cumulative errors creating ineffectiveness, notwithstanding that

several circuit courts of appeal allow for cumulative error as a basis for section 2255 relief.

IT IS SO ORDERED.

Dated this 9th day of July, 2004.

/S/ Charles R. Wolle

CHARLES R. WOLLE, JUDGE

United States District Court

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 04-2467

Ernest Carl Crank,	
Appellant,	Appeal from the United States
vs.	District Court for the Southern
United States of America,	District of Iowa
Appellee.	

Before LOKEN, Chief Judge, FAGG, and BEAM, Circuit Judges

JUDGMENT

Upon consideration of the government's motion to vacate the certificate of appealability, the certificate of appealability is hereby vacated as improvidently granted. Appellant's motion to remand for remand is denied as moot. The appeal is dismissed. (5361-010199)

August 11, 2004

Order Entered at the Direction of the Court:

/S/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Thomas F. Eagleton Court House

Room 24.329 VOICE (314)244-2400

Michael E. Gans 111 S. 10TH Street FAX (314)244-2780

Clerk of Court St. Louis, Missouri 63102 www.ca8.uscourts.gov

December 17, 2004

Mr. James R. Rosenbaum

Clerk

U.S. DISTRICT COURT, SOUTHERN IOWA

P.O. Box 9344

Des Moines, IA 50306-9344

Re: 04-2467 Earnest Carl Crank vs. USA

Dear Clerk:

The mandate of this Court is being sent to the clerk of the district court, together with a receipt. The clerk of the district court is requested to sign, date, and return the receipt to this office.

D-2

Any district court records in this court's possession will be returned shortly.

(5175-010199)

Michael E. Gans

Clerk of Court

Dms

Enclosure

(LETTER FOR INFORMATIONAL PURPOSES ONLY)

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cc: Honorable Charles R. Wolle

Ernest Carl Crank

Clemens A. Erdahl

Clifford R. Cronk III

District Court/Agency Case Number(s): 4:02-cv-80569

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 04-2467

Ernest Carl Crank,	
Appellant,	Appeal from the United States
vs.	District Court for the Southern
United States of America,	District of Iowa
Appellee.	

The following events transpired during calendar year 2004. On August 11, the court vacated a certificate of appealability issued by the district court on four of six issues raised by Crank and dismissed his appeal. Instead of filing a timely petition for rehearing and rehearing en banc, Crank moved for an extension until November 24 to file his petition, and the motion was granted on September 27. Again, instead of filing a timely petition, Crank moved for another sixty-day extension. This motion was denied on December 10, and having dismissed the appeal on August 11, the mandate issued on December 17. On the same day, Crank filed an application for a certificate of appealability on the two issues the district court rejected when it

issued the certificate of appealability mentioned above. In considering Crank's application, we necessarily construe it to include a request to recall the mandate, and having carefully considered the sequence of events summarized above, we deny Crank's request to recall the mandate and having carefully considered the sequence of events summarized above, we deny Crank's request to recall the mandate and his application for a certificate of appealability.

It is so ordered.

January 31, 2005

Ordered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

AFFIDAVIT OF JACKIE L. HARRIS

STATE OF IOWA)
) ss:
COUNTY OF LINN)

I, Jackie L. Harris, being first duly sworn on oath do depose and state that I am a legal assistant with the firm of Nidey Peterson Erdahl & Tindal, PLC, in Cedar Rapids, Iowa. I further state that on December 17, 2004, I faxed to the Clerk of the 8th Circuit Court of Appeals in St. Louis, Missouri, at 314-244-2780, an eight-page Motion for Certificate of Appealability and a one-page cover sheet in case number 04-2497 at the direction of attorney Clemens A. Erdahl. Upon examination of the fax confirmation information and the telephone bill for the firm's fax line, both of which are attached herewith, I can state with certainty that the fax was sent at 10:56 a.m. CST. While the fax confirmation indicates a transmittal time of one hour later, I believe that the telephone bill is the more accurate document as the firm's fax machine is often not adjusted to reflect changes to and from daylight savings time.

Jackie L. Harris

Subscribed and sworn to before me by the aforesaid Jackie L. Harris on this 29th day of April, 2005.

NOTARY PUBLIC, STATE OF IOWA

NOTARIAL SEAL IOWA

FRANK J. NIDEY
COMMISSION NO. 148752
MY COMMISSION EXPIRES
9/24/06

From:	VIA Transmission - Eighth Circuit U.S. Court of Appeals Clerks Office
To:	Clemens A. Erdahl
Date:	December 17, 2004 12:52 PM
Pages:	2
Subject:	Via Notice for case 04-2467 ~04-2467:dms245926121704P2-4:0

D-1

----------VIA TRANSMISSION----------

TO: Clemens A. Erdahl

FROM: United States Court of Appeals for the Eighth Circuit

Circuit Clerks Office
111 South 10th Street
Suite 24.329
Saint Louis, MO 63102

Voice: 314-244-2400 Fax..: 314-244-2780

TRANSMISSION VERIFICATION REPORT

TIME : 12/17/2004 12:01
NAME :
FAX :
TEL :
SER.# : BROD3N843317

DATE,TIME	12/17 11:58
FAX NO./NAME	13142442780
DURATION	00:02:48
PAGE(S)	09
RESULT	OK
MODE	STANDARD

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F-4

NO.	DATE	TIME	CALLED NUMBER	CALLED LOCATION	PRD	TYPE	MIN
Line: 319-369-6972							
329	12/16	4:16 PM	515-284-6281	DES MOINES, IA	F	DD	1.3
330	12/17	9:23 AM	319-668-1706	WILLIAMSBG, IA	F	DD	2.7
331	12/17	10:26 AM	319-668-1706	WILLIAMSBG, IA	F	DD	1.4
332	12/17	10:30 AM	319-668-1706	WILLIAMSBG, IA	F	DD	.7
333	12/17	10:33 AM	319-668-1706	WILLIAMSBG, IA	F	DD	.9
334	12/17	10:56 AM	314-244-2780	ST LOUIS, MO	F	DD	3.0
[illegible]	[illegible]	[illegible]	319-334-6641	INDEPNDNCE, IA	F	DD	.8

BEST AVAILABLE COPY